

State of California

State Energy Resources Conservation and Development Commission

In the Matter of:)	Docket # 09-AFC-04
)	PMPD Comments
Oakley Generating Station)	Robert Sarvey
)	
)	
)	

Biological Resources

On April 21, 2011 the Commission posted a letter from the California Department of Fish and Game (DFG). This letter was posted over a month after the close of the record and two weeks after the PMPD was published. The letter was dated February 11, 2011 and provided the DFG comments on the Preliminary Staff Assessment. The final decision must explain why this letter was not posted or given to the Committee for consideration. In the Marsh Landing Decision this Commission expressed disappointment in the USFWS comments which it claims were received a day or two before the full Commission approval of the project. As the Commission stated in the Marsh Landing final decision, “A day or two before we adopted this Decision we received letters commenting on the PMPD from two sister agencies and others. To the extent those comments present facts not previously contained in the record, they are improper. (See Cal. Code Regs., tit. 20, §§ 1751, subd. (a), 1754, subd. (b).)”¹ It is equally improper for this Commission to withhold agency comments for two months that have a material bearing on the impact of this project. To comply with due process, Cal. Code Regs., tit. 20, §§ 1754, subd. (b), requires that the record must be reopened to receive these comments and additional hearing time is necessary for consideration of the DFG comments.

Just like the Marsh landing preceding the USFWS has provided comments that the mitigation provided for nitrogen deposition impacts from the OGS is wholly inadequate. The comments from DFG reinforce the Wildlife services position.² Additionally the

¹ Marsh Landing Generating Station Commission final decision Page 3

<http://www.energy.ca.gov/2010publications/CEC-800-2010-017/CEC-800-2010-017-CMF.PDF>

²

“The Staff Assessment does not clearly indicate how the proposed mitigation for nitrogen deposition impacts (Mitigation Measure BIO-19) will address and fully mitigate expected project impacts. The analysis does not describe the management activities that are needed to offset the project's impact; therefore, it is unclear whether the proposed financial contribution will be sufficient to address such management needs. If the current mitigation proposal does not adequately anticipate the future costs of management, labor, supplies, transport, utilities, etc. necessary to address the project's contribution to increased nitrogen deposition, management activities at Antioch Dunes NWR may not be

comments of DFG raise two issues which have not been addressed by the PMPD or the FSA. The first is that:

"The CESA 'jeopardy' clause [Section 2081(c)] prohibits issuance of an incidental take permit if 'issuance of the permit would jeopardize the continued existence of the species.' Permits issued under CESA must demonstrate a finding that the Project will not put species at risk of extinction based on 'best scientific and other information that is reasonably available' regarding '(1) known population trends; (2) known threats to the species; and (3) reasonably foreseeable impacts on the species from other related projects and activities.'"

CESA also requires 'full mitigation' for any act that would result in take of a state-listed species [CESA Section 2081(b)]. Full mitigation means that no net loss of listed species may occur as the result of a proposed action. Under CESA, impacts include direct, indirect and cumulative effects. Neither DFG nor any other public agency may issue a CESA incidental take permit for unavoidable and/or unmitigated impacts to listed species.³

The second issue not addressed in the PMPD or the FSA is;

Finally, proposed mitigation does not take into account loss or degradation of habitat on private lands. Without management, invasive species spread will likely result in local species extirpations within these patches of isolated habitat. It may be necessary to acquire, conserve and manage additional

able to control the spread of invasive species. The resulting impact on listed species would be an avoidable residual impact, which is not allowable under CESA. DFG recommends that the CEC consult with USFWS to determine what resources are necessary for management of invasive species and whether the current operating budget of the Antioch Dunes NWR is an appropriate baseline for calculation of mitigation fees.

Preparation of a Property Analysis Report (PAR), a tool used by DFG and USFWS to estimate habitat management costs based on a habitat management strategy, may be useful in this regard. DFG strongly recommends that CEC obtain written concurrence from the USFWS on the mitigation proposal prior to approval of the project. The terms of the mitigation agreement, including financial compensation, must be acceptable to the USFWS, who would bear the burden for management activities. Prior to accepting the proposed mitigation, the CEC should also consult with USFWS as to whether the agency is willing to accept the mitigation burden on behalf of the applicant. Without clear agency consent to this mitigation arrangement, the proposed mitigation transfers responsibility for impact abatement from a private party to a public agency.

³ DFG Comments on the Preliminary Staff Assessment Page 2
http://www.energy.ca.gov/sitingcases/oakley/documents/others/2011-02-11_CDFG_Comments_on_PSA_Part_B_TN-60303.pdf

habitat within the project vicinity to achieve the CESA full mitigation standard.”⁴

The final decision or the RPMPD must address both of these issues. The PMPD relies on the testimony of two CEC biologists with limited professional experience. The PMPD rejects the opinion of the United States Fish and Wildlife Service, the California Department of Fish and Game who are sister agencies that have provided timely comments and are the experts in the field. **§ 1744 (e) requires that** comments and recommendations by a interested agency on matters within that agency’s jurisdiction shall be given due deference by Commission staff. Staff and the PMPD fail that standard.

The testimony of USFWS and DFG is supported by Dr. Stuart Weiss who is quoted as a reference by CEC staff six times in their analyses.⁵ There is substantial evidence in the record that the mitigation proposed is inadequate and the Final Decision must require the appropriate mitigation or be in violation of CEQA and the Endangered Species Act and the California Endangered Species Act.

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The project owner’s one-time payment of approximately \$227,408 in mitigation fees to the Conservancy will further reduce to less than significant levels temporary and permanent impacts to the habitat of species covered under the ECCHC/NCC Plan. (Ex. 300, pp. 4.2-1, 4.2-36, 4.2-59.) Conditions of Certification **BIO-21** and **BIO-22** require the project to comply with Plan permitting requirements.

Comment: The OGS will pay the ECCHC/NCC up to \$565,441.06 according to their agreement.⁶

Introduction Page 1

The PMPD states that, “The facility will be capable of operating 24 hours per day, 7 days per week and will be designed as a baseload facility with the added capabilities of rapid startup, high turndown capability (i.e. ability to turn down to a low load), and high ramp rates.”

Comment: The project does not have rapid startup capability. The CAISO categorizes units with startup times less than 10 minutes as *fast-start* in the report titled, 2010 Integration of Renewable Resources (CAISO 2010).⁷ Fast start units are needed to

⁴ DFG Comments on Preliminary Staff Assessment, Part B, Docket 09-AFC-4, Oakley Generating Station, Contra Costa County
http://www.energy.ca.gov/sitingcases/oakley/documents/others/2011-02-11_CDFG_Comments_on_PSA_Part_B_TN-60303.pdf

⁵ Exhibit 402

⁶ http://www.co.contra-costa.ca.us/depart/cd/water/HCP/Meetings/pdfs/2011/3-21-11/9_OGS.pdf Page 5

⁷ Exhibit 300 Page 4.1-85

respond to rapid changes in output of renewable generation. The OGS is not capable of starting up in less than 10 minutes. Start up times for the OGS could be as long as 90 minutes.⁸ Minimum load for one turbine of the OGS would be over 160 MW which does not provide a great deal of operating flexibility. The OGS does not have high turndown capability. As stated in the CPUC Decision denying the Oakley Project D. 10-7-045, *“Though PG&E presents the Oakley Project as a flexible fast ramping facility, CARE points to information found in PG&E’s confidential evaluation of the project that calls this assertion into question. CARE further argues that because it is limited to less than one start a day, the Oakley Project does not comply with our directive in D.07-12-052 that the utilities ‘procure dispatchable ramping resources that can be adjusted for the morning and evening ramps created by the intermittent types of renewable resources.’”*⁹

Introduction page 3

The PMPD States, “The Commission's certification process provides a thorough review and analysis of all aspects of a proposed power plant project. During this process, the Energy Commission conducts a comprehensive examination of a project's potential economic, public health and safety, reliability, engineering, and environmental ramifications.

Comment: The Commission Certification process does not evaluate the potential economic impact of the project or the need for the project. This is despite the fact that Title 20 § 1741 (a) states, “that the purpose of an application proceeding is to ensure that any sites and related facilities certified provide a reliable supply of electrical energy at a level **consistent with the need for such energy and in a manner consistent with public health and safety, promotion of the general welfare, and protection of environmental quality.**”

The only need analysis in the record was provided in Exhibit 400 which conclusively showed that the OGS is not needed at this time. This need analysis was the same analysis provided by me as CARE’s witness in A.09-09-021 which resulted in Decision D. 10-07-045. Findings of fact 9-12 of D 10-07-045 the only final decision in the LTPP concurs with the analysis provided in Exhibit 400:

“9. We relied on the CEC’s 2007 draft forecast in D.07-12-052 because it was the most current public information available and therefore provided a better ‘snapshot’ of the needs of the system at the time.

10. The CEC’s 2009 IEPR subsequently found the 2007 California Energy Demand forecasted need determination to be “markedly” higher.

11. No party in this proceeding disputes that the CEC’s 2009 IEPR forecast of peak demand for the PG&E planning area in 2015 is less than in the 2007 CEC

⁸ FDOC Page 18

⁹ D. 10-07-045 Page 39 http://docs.cpuc.ca.gov/word_pdf/FINAL_DECISION/121605.pdf

forecast relied upon in D.07-12-052.

12. Given reporting errors and changes in demand in its service territory, PG&E only needs to procure 950 - 1000 of its previously approved MW allotment.¹⁰

D. 07-12-045 finding of fact number 18 is that, ***“The Oakley Project is not needed at this time.”¹¹***

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The PMPD states that, “The Final Staff Assessment (FSA) was published in two parts: the first part as an FSA, and the second part as a Supplemental Staff Assessment (SSA). On January 25, 2011, the Committee issued a Notice to all parties of the Prehearing Conference and Evidentiary Hearing to be held on Tuesday, March 15, 2011, in Oakley, California. An additional day of Evidentiary Hearings was held on March 25, 2011, at the Energy Commission headquarters in Sacramento.

Comment: The final Staff Assessment was not published until March 1, 2011. The supplemental Staff Assessment was published on March 10, 2011.

Alternatives page 2

The PMPD states that, *“The CEC Staff defined the projects objectives as follows;*

- *Provide efficient, reliable, and predictable power supply capable of supporting the growing power needs of the Bay Area;*
- *Provide operational flexibility and **rapid-start** and dispatch capability;*
- *Site the project within the area of electrical demand and near existing infrastructure, thus minimizing the project’s linear facilities;*
- ***Site the project on a brownfield*** (previously disturbed) or industrial site.¹²

The OGS would be located in Contra Costa County, within the Oakley City limits. The approximately 22-acre parcel is currently farmed for wine grapes. The California Department of Conservation designates the site as Farmland of Statewide Importance.¹³

¹⁰ D. 10-07-45 Page 53 http://search.aol.com/aol/search?query=CPUC&s_it=keyword_rollover

¹¹ D. 10-07-045 Page 53 http://search.aol.com/aol/search?query=CPUC&s_it=keyword_rollover

¹² PMPD Alternative Page 2

¹³ Exhibit 300 Page 6-2

A (1.6-acre) conservation area exists on site, which includes a 0.62-acre mitigation wetland. The OGS site is not a brownfield site.

The legal definition of a brownfield site is found in Public Law 107-118 (H.R. 2869) - "Small Business Liability Relief and brownfields Revitalization Act" signed into law January 11, 2002, "*The term "brownfield site" means real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.*"¹⁴

Black's Law Dictionary defines a brownfield site as "[a]n abandoned, idled, or underused industrial or commercial site that is difficult to expand or redevelop because of environmental contamination." The OGS does not meet any of these descriptions and is clearly not a brownfield Site. The OGS site fails to meet one of the projects main objectives and a priority of the State to locate the project on a brownfield site.

As mentioned above one of the objectives of the project was to, "Provide operational flexibility and rapid-start and dispatch capability. The CAISO categorizes units with startup times less than 10 minutes as *fast-start* in the report titled, 2010 Integration of Renewable Resources (CAISO 2010).¹⁵ Fast start units are needed to respond to rapid changes in output of renewable generation. The OGS is not capable of starting up in less than 10 minutes. Start up times for the OGS could be as long as 90 minutes.¹⁶ Minimum load for one turbine of the OGS would be over 160 MW which does not provide a great deal of operating flexibility. The ability of the OGS to turndown to low loads does not exist. The OGS technology does not meet one of the projects primary objectives which is to provide low turndown and a startup times of less than 10 minutes. The project fails to meet two of the four basic project objectives defined by the CEC Staff.

Alternative Page 10

The PMPD states, "One alternative to meeting California's electricity demand with new generation is to reduce the demand for electricity. Such conservation and demand side measures include reducing energy use by increasing energy efficiency and conservation, implementing commensurate building and appliance standards, and addressing load management and fuel substitution. (*Id.*)

Even with a great variety of federal, state, and local demand side management programs, the state's electricity use is still increasing as a result of population growth and business expansion. Current demand side programs are not sufficient to satisfy future electricity needs, nor is it likely that even more aggressive demand side programs could accomplish this, given the economic and population growth rates in recent years. Therefore, although it is likely that federal, state, and local demand side programs will receive even greater emphasis in the future, both new generation and new transmission facilities are needed in the immediate future and beyond to maintain adequate supplies. (Ex, 300, p. 6-16.)

¹⁴ <http://epa.gov/brownfields/overview/glossary.htm>

¹⁵ Exhibit 300 Page 4.1-85

¹⁶ FDOC Page 18

Comment: There is no evidence in the record that the state's electricity use is increasing. The only evidence in the record Exhibit 400 demonstrates quite the opposite. Demand is decreasing and expected to continue decreasing in the near future due to the states successful energy efficiency measures and the economic downturn. In December of 2009 the California Energy Commission approved the California Energy Demand 2010-2020 forecast a revised demand and peak load forecast. *"The current forecast is markedly lower than the forecast in the 2007 California Energy Demand Forecast, primarily because of lower expected economic growth in both the near and long term as well as increased expectations of savings from energy efficiency."*¹⁷ The CEC's latest Revised Short Term Peak Demand Forecast for the 2011-2012 period predicts that PG&E's demand in the PG&E service territory for 2012 is 851 MW less than the 2009 IEPR.¹⁸ The difference between the CEC's most recent demand forecast for PG&E's service territory is 1,661 MW less than the demand forecast for PG&E's service territory in 2007. As Staff's testimony states, "The Energy Commission noted that energy efficiency helped flatten the state's per capita electricity use and saved consumers more than \$56 billion since 1978 (CPUC 2008). The investor-owned utilities' 2006-2008 efficiency portfolio marks the single-largest energy efficiency campaign in U.S. history, with a \$2 billion investment by California's energy ratepayers (CPUC 2008)."¹⁹

The PMPD provides no evidence that energy consumption is increasing and there exists no evidence in the record to support that conclusion. With the large reserve margins and the decline in energy consumption in PG&E's service territory the PMPD's speculation that, *"nor is it likely that even more aggressive demand side programs could accomplish this, given the economic and population growth rates in recent years,"* is not supported by the evidence in the record.. The evidence in the record is that energy efficiency is the environmentally superior alternative.

Land Use

The Energy Commission's licensing process is supposed to include findings regarding the conformity of the proposed facility with applicable local, regional, state, and federal standards, ordinances, and laws (Pub. Res. Code § 25523 [d][1]) As the PMPD correctly states, *"If the City had exclusive jurisdiction over the project it would require the project to comply with City's Conditional Use Process (CUP) and other requirements of the municipal code. As suggested by Intervenor Sarvey in his post-hearing brief, the City would likely require a variance to allow the project's building height to exceed 200 feet."* The FSA and the PMPD do not contain the required findings that the City would have to provide to issue a conditional use permit. Hence the PMPD does not comply with Pub.

¹⁷ 2009 IEPR page 3 <http://www.energy.ca.gov/2009publications/CEC-100-2009-003/CEC-100-2009-003-CMF.PDF> , Exhibit 400 Page 2

¹⁸ Table 5 Page 13 <http://www.energy.ca.gov/2011publications/CEC-200-2011-002/CEC-200-2011-002-CTF.PDF> Table 5: Revised and 2009 IEPR Weather-Adjusted Peak

Demand (MW) Forecast by TAC/Load Pocket, 2011 and 2012 1-in-2 Difference

¹⁹ Exhibit 300 Page 6-16

Res. Code § 25523 [d][1]. The Final Decision must contain these findings and provide the public with an opportunity to comment on them.